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Supreme Court of the United States

OCTOBER TERM, 1934

FRANK H. COONEY, as Governor of the State of Montana; RAYMOND T. NAGLE, as Attorney General of the State of Montana; and JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANTS

Appeal from the District Court of the United States, in and for the District of Montana.

STATEMENT OF THE CASE

This is an appeal from a permanent injunction decree (R. 26) granted by a specially constituted District Court of the United States, for the District of Montana, convened under the provisions of Section 266 of the Judicial Code, as amended (28 U. S. C. A. 380), restraining and enjoining the appellants from taking any action against the appellee to enforce against the appellee the provisions of Chapter 174 of the Session Laws of Montana, 1933, or said Act as amended by Chapter 54 of the Session Laws

of the Extraordinary Session of 1933-34 (see Appendix for Act and as amended), and from collecting or attempting to collect any tax or enforcing or attempting to enforce any penalty provided therein.

Section 1 of Chapter 174, Laws of Montana, 1933, provided for the collection from any person, firm, etc., engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, of an annual license tax for each telephone instrument where the rate exceeds Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone, at the following rate: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such telephone instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) such telephone instruments a license tax of One Dollar ($1.00) for each instrument.

Section 1 of Chapter 54, Laws of Montana, 1933-34 amending said Chapter 174, provides for the collection from every person, firm, etc., engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, of a license fee of $2.00 for each instrument where the rate charged the customer therefor exceeds Two Dollars ($2.00) for each instrument per month for residence phone or Four Dollars ($4.00) per month for business house or office phone.

The original Act (Chapter 174, supra) provides that "the license tax so paid shall in no manner effect the

rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern." Section 1 of Chapter 54, supra, amending said Section 1, Chapter 174, does not contain such clause but provides that "no bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act." It also provides that "the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Appellee, a Colorado corporation, authorized to do business in Montana, operates a telephone business of an interstate and an intrastate character extending throughout the States of Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico and a portion of Texas. Its system is one of the units of a telephone system extending throughout the United States and foreign countries. The appellee is subject to the jurisdiction of the Public Service Commission of the State of Montana, as to its intrastate business and to the jurisdiction of the Interstate Commerce Commission under the provisions of the Interstate Commerce Act.

All the telephone instruments affected by this Act, and as amended, are connected with this system so that they may be used for long distance calls. Some of them have been so used since the passage of this Act, and, eventually, practically all of them will be used in long distance calls, (R 41), that is, in interstate or foreign business. In addi-

tion to the telephone calls transmitted over its telephone instruments, the telephone company has also made arrangements with telephone and cable companies, whereby telephone and cable messages of an interstate, international, as well as intrastate character, are delivered.

The monthly rate of $2.00 per month for residence phones and $3.00 or $4.00 per month for business or office phones, entitles the subscriber or patron to use the telephone for local or intrastate calls only. (R 44). He may not use the telephone for long distance calls, either interstate or intrastate, unless he pays a toll, an extra charge for such use. The evidence discloses that of the total revenue for long distance calls, which, of course, included intrastate, as well as interstate and foreign business, 25 to 30 per cent is interstate. (R. 41, 42). None of this 25 to 30 per cent revenue is derived from the monthly charge to patrons which is paid for local use only. (R. 44). The interstate revenues of the company are from 4 to 8 per cent of the total revenues received by the telephone company in the State of Montana. (R. 42).

SPECIFICATION OF ERRORS

Appellants specify the following errors, which they intend to urge:

I

The Court erred in finding that any and all of the telephones which the appellee maintains in the State of Montana, may be used in interstate or foreign commerce for the reason that the evidence presented is insufficient to support such finding.

II

The Court erred in finding that all of the telephones constituting a part of the appellee's telephone system in Montana, are instrumentalities of interstate and foreign commerce for the reason that the evidence presented is insufficient to support such finding.

III

The Court erred in holding and finding that appellee could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business for the reason that the evidence presented is insufficient to support such holding and finding.

IV

The Court erred in holding that Chapter 174 of the Session Laws of Montana 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session 1933-34, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, in that it imposes a burden upon and constitutes a regulation of interstate and foreign commerce, the evidence being insufficient to support such holding or finding; and it appearing that said act, and as amended, levies a tax solely upon or on account of the intrastate business of the plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business of the appellee.

V

The Court erred in rendering a decree for the appellee herein permanently enjoining and restraining the appel-

lants, and each of them, and any and all persons acting in aid or assistance of them, or either of them, from taking any action against the appellee to enforce against the appellee the provisions of Chapter 174 of the Session Laws of Montana of 1933, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session of 1933-34, and from collecting or attempting to collect any tax, or enforcing or attempting to enforce any penalty provided for therein, on the ground that said act, and as amended, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of interstate and foreign commerce as said Act, and as amended, levies a tax solely upon the intrastate business of the said plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business or commerce of the plaintiff.

VI

The Court erred in failing to dismiss the bill of complaint inasmuch as said Act, and as amended, is valid as it merely levies or attempts to levy a tax solely upon, or on account of the intrastate business of the appellee and it imposes no tax restriction or burden upon the interstate or foreign business or commerce of the appellee.

SUMMARY OF ARGUMENT

I

The Act, and as amended, does not interfere with or impose a burden upon interstate commerce, but is merely a tax upon intrastate commerce.

Ogden v. Crossman, 14 Utah 66, 53 Pac. 985;

State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311;
State v. Northern Pacific Express Company, 27 Mont. 419, 71 Pac. 404;
Ratterman v. Western Union Tel. Co., 127 U. S. 411;
The State Freight Tax, 15 Wall. 232;
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192;
Postal Tel.-Cable Co. v. Charleston, 153 U. S. 692;
Pacific Express Co. v. Seibert, 142 U. S. 339;
Osborne v. Florida, 164 U. S. 650;
Pullman Co. v. Adams, 189 U. S. 420;
Allen v. Pullman Co., 191 U. S. 171;
Kehrer v. Stewart, 197 U. S. 60;
Crutcher v. Kentucky, 141 U. S. 47;
Ohio River & W. R. Co. v. Ditty, 232 U. S. 576;
St. Louis Southwestern Railway Company v. Arkansas ex rel. Norwood, 235 U. S. 350;
People ex rel. Cornell Steamboat Company v. Sohmer, 235 U. S. 549;
Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124;
Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252;
Raley & Bros. v. Richardson, 264 U. S. 157;
Sprout v. South Bend, 277 U. S. 163;
East Ohio Gas Company v. Tax Com. 283 U. S. 465;

A. The statute is a tax upon the telephone instruments in form only; in substance it is a tax upon intrastate business measured by the number of telephones in intrastate use. The court will look through the form to the substance of things.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Cudahy v. Hinkle, 278 U. S. 460, 470;
Postal Telegraph-Cable Co. v. Adams, 155 U. S. 688, 698;
Adams Express Co., v. New York, supra;

State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311;
Ogden City v. Crossman, 17 Utah 66, 53 Pac. 985;
Sonneborn Bros. v. Curcton, 262 U. S. 506, 519;
Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 295;

B. Although a license tax upon intrastate commerce may have an indirect and incidental effect upon interstate commerce, it is not for that reason unconstitutional. The same principal applies as in ad valorem taxes and taxes for police regulation. A practical interpretation should be given to the act.

Virginia v. Imperial Coal Sales Company, Incorporated, ...U. S.....;
Robbins v. Shelby County Taxing District, 120 U. S. 489, 492; (and other cases listed);
Allen v. Pullman Co., 191 U. S. 171, 181;
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 44;
Osborne v. Florida, supra;
Hump Hairpin Co. v. Emmerson, supra;
Boston & Main R. Co. v. Armbury, 285 U. S. 234, 238;
Edelman v. Boeing Air Transp., 289 U. S. 249;
Helson v. Kentucky, 279 U. S. 245;
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249;
Eastern Air Transport v. Tax Comm., 285 U. S. 147;
New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346.

C. The Telephone Company may discontinue its intrastate business without also withdrawing from interstate commerce. The permissive charter of the company obtained by virtue of the Montana Constitution does not require the company to operate at a lose. That withdrawal from intrastate commerce may be impracticable

or inconvenient will not make the license tax unconstitutional.

Railroad Company v. Eastern Texas R. R. 264 U. S. 79;
Pullman v. Adams, 189 U. S. 420;
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 41.

D. The statute does not prevent the charging of the tax to operating cost. If a clause in the original act so provided, that clause may be void without rendering the whole act unconstitutional. Since no application has been made to the Public Service Commission for increase of rates, appellee cannot complain.

59 C. J. 639;
Postal Telegraph-Cable Co. v. City of Fremont, 255 U. S. 124, 41 Sup. Ct. Rep. 279.

E. A similar statute has been construed by the Montana Supreme Court as applying to and affecting intrastate business only, and as not affecting interstate commerce. Federal courts will follow the construction given by a state court to its own statute.

Ogden City v. Crossman, 17 Utah 66, 53 Pac. 985;
State v. Rocky Mountain Bell Tel. Co. 27 Mont. 394, 71 Pac. 311;
State v. Northern Pacific Express Co., 27 Mont. 419, 425, 71 Pac. 404;
Osborne v. State of Florida, supra;
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 (supra);
St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350 (supra);
Campbell v. City of Olney, 262 U. S. 354;
In re Floyd and Hayes, 225 Fed. 262, 265.

F. There is not sufficient evidence upon which the court could find that all of the telephone instruments

which appellee maintains in Montana, are instrumentalities of interstate or foreign commerce. Evidence of potential or occasional use of telephone instruments for that purpose does not justify finding that such instruments are instrumentalities of interstate or foreign commerce when in fact they are actually used exclusively or almost exclusively for intrastate commerce. Nor was the finding that appellee could not discontinue its intrastate business and operations in Montana, without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business, warranted by the evidence.

II

The statute does not impair the obligation of a contract. No contract exists by which the state is prevented from collecting a tax otherwise valid.

Section 7, Article XII, of the Montana Constitution.

III

The statute does not deny to appellee the equal protection of the law. The penalty for violation of the statute is not too severe.

Tax Commissioners v. Jackson, 283 U. S. 527;
American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89;
Quong Wing v. Kirkendall, 223 U. S. 59;
Metropolis Theater Co. v. Chicago, 228 U. S. 61;
Cargill v. Minnesota, 180 U. S. 452;
Armour Packing Co. v. Lacy, 200 U. S. 226;
Bradley v. Richmond, 227 U. S. 477;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Rast v. Van Deman & Lewis Co., 240 U. S. 342;

Armour & Co. v. Virginia, 246 U. S. 1;
Bronson v. Brush, 251 U. S. 182;
Alward v. Johnson, 282 U. S. 509;
Consolidated Coal Co. v. Illinois, 185 U. S. 203;
Citizens Tel. Co. v. Fuller, 229 U. S. 322;
O'Connell v. State Board of Equalization, 95 Mont. 91, 25 Pac. (2d) 114-199;
12 C. J. p. 1177, Section 927;
Rail, etc., Coal Co. v. Yaple, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607;
Portland R., etc., Co. v. Portland, 210 Fed. 667;
Oregon R., etc., Nav. Co. v. Campbell, 173 Fed. 957;
Chicago, etc., R. Co. v. Davis, 114 Ark. 519, 170 S. W. 245;
State v. Oregon, etc., Co., 68 Wash. 160, 123 Pac. 3;
Rail etc., Coal Co. v. Ohio Industrial Commission, supra.

IV

The act does not deprive the Telephone Company of its property without due process of law. Appellee may deduct the tax as an operating expense, any clause in the original act to the contrary notwithstanding. There has been no application to the Public Service Commission for relief. There is no proof that the tax is confiscatory.

V

The act does not violate the Montana Constitution on the ground that it directs the State Treasurer to pay out of the state treasury without specific appropriation, or because the amount credited to the relief fund is not specified. The Constitution does not require that an appropriation be specific in dollars and cents. The amount of the tax can be determined by a simple mathematical calculation.

59 *C. J. p.* 250;
State v. State Board of Examiners, 74 Mont. 1, 238 Pac. 315;
People v. Miner, 46 Ill. 384.

VI

The act does not delegate legislative power to the Governor and does not for this reason violate the Montana Constitution. The Governor merely determines a fact and this the legislature may authorize him to do.

Field v. Clark, 143 U. S. 649, 694;
Union Bridge Co. v. U. S., 204 U. S. 364, 377;
U. S. v. Grimaud, 220 U. S. 506;
Hampton & Co. v. U. S., 276 U. S. 394, 405;
Buttfield v. Stranahan, 192 U. S. 470;
In re Kollock, 165 U. S. 526;
Oceanic Navigation Co. v. Stranahan, 214 U. S. 320;
Interstate Commerce Commission v. Goodrich, Transit Co., 224 U. S. 194, 214;
State v. Chicago etc., Ry. Co., 38 Minn. 281, 298, 302; 134 U. S. 418, 459, 461, 464;
State v. Board of Examiners, 74 Mont. 1, 238 Pac. 316;
State v. Johnson, 75 Mont. 240, 243 Pac. 1073;
Chicago etc., Ry. Co. v. Board of Railroad Commissmissioners, 76 Mont. 305, 247 Pac. 162;
State v. Asal, 79 Mont. 385, 256 Pac. 1071;
Northern Pacific Ry. Co. v. Bennett, 83 Mont. 483, 272 Pac. 987;
12 *C. J.* 846, *note* 76.

VII

The claim of the company that the operation of its telephone system in Montana, is a duty it cannot abandon and not a privilege, and, therefore, it cannot be taxed, is untenable. The duty to serve the public as long as it occupies the field, makes the operation of a telephone in

Montana nevertheless a privilege. The company may discontinue its business when it cannot operate at a profit.

City of Helena v. Helena Light & Ry. Co., 63 Mont. 108, 207 Pac. 337;
State v. Helena P. & L. Co., 22 Mont. 391.

VIII

The statute is not a special law for the assessment or collection of taxes; it is general in scope and operates upon all alike within a given class.

Hart Refineries v. Harmon, 81 Mont. 423, 263 Pac. 687;
State ex rel. Federal Land Bank v. Hayes, 86 Mont. 58, 282 Pac. 32;
State ex rel. Redmen v. Meyers, 65 Mont. 124, 210 Pac. 1064;
Trumper et al. v. School District, 55 Mont. 90, 173 Pac. 946;
59 *C. J.* 729 *and cases cited in notes* 41 *and* 64;
59 *C. J.* 732, *Section* 319, *note* 80.

IX

The state is not without power to furnish relief in case of a great and general emergency even though the Montana Constitution lays a duty upon the counties to furnish relief. The grant of power to the counties does not limit the power of the legislature, and, if it did, the state having the right of self-preservation, may act under its police power. Regardless of relief, the legislature would have enacted the law for revenue anyway.

State v. State Board of Equalization, 56 Mont. 413, 185 Pac. 708;
Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093;
Hilger v. Moore, 56 Mont. 146, 182 Pac. 477;
In re Pomeroy, 51 Mont. 119, 151 Pac. 333;

O'Connell v. State Board of Equalization, 95 Mont. 1, 25 Pac. (2d) 114;
State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309;
Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294.
State v. Russell, 84 Mont., 61, 246 Pac. 148;
McNair v. School District, 87 Mont. 423, 288 Pac. 188;
City etc., v. Collins, 216 Cal. 187, 13 Pac. (2d) 912;
State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 Pac. (2d) 199;
State v. Industrial Commission, 207 Wis. 652, 242 N. W. 321;
Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917 E 938, Ann. Cas. 1918 A 1024;
Black v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 460, 65 L. Ed. 865, 16 L. R. A. 165;
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877;
Levy Leasing Co. v. Siegel, 258 S. W. 242, 42 Sup. Ct. 289, 66 L. Ed. 595;
Chastleton Corporation v. Sinclair, 264 U. S. 543 44 Sup. Ct. 405, 406, 68 L. Ed. 841;
Home Loan Building & Loan Association v. Blaisdell, 290 U. S. 398;
Walker v. Bedford, 93 Colo. 400, 26 Pac. (2d) 1051, (dissenting opinions);
Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Commonwealth v. Liveright, 308 Pa. 35, 161 Atl. 697;
Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 87 A. L. R. 365;
Dill v. People, 94 Colo. 230, 29 Pac. (2d) 1035;
State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;
59 *C. J.* 855.

X

The Montana Constitution authorizes the imposition of a license for revenue.

Article XII, Section 1, *of the Montana Constitution*;
State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516;
Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982;
State v. Hammond Packing Co., 45 Mont. 343, 123 Pac. 407; Id., 233 U. S. 331, 58 L. Ed. 985, 34 Sup. Ct. Rep. 596;
Equitable Life Assur. Co. v. Hart, 55 Mont. 76, 183 Pac. 1062.

XI

There is no proof in the record that the tax is arbitrary, unreasonable or oppressive.

XII

A statute should be construed, if possible, so as to make it constitutional. Federal courts will follow a state court in the construction of its own statute.

New York Central R. R. v. United States, 212 U. S. 481;
State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841;
12 *C. J.* 698, *Section* 37.

ARGUMENT

In considering whether the court erred in its holding and decree enjoining the collection of the tax instead of dismissing the Bill of Complaint several questions are presented by issues made by the pleadings. Since the court based its holding and decree solely upon the question of violation of the commerce clause of the Constitution,

(Specification of errors 3, 4, 5 and 6), we shall consider that question first, under Argument I, A-E. Specification of errors I-III will be considered under I, F of Argument.

I

THE ACT, AND AS AMENDED, DOES NOT INTERFERE WITH OR IMPOSE A BURDEN UPON INTERSTATE COMMERCE, BUT IS MERELY A TAX UPON INTRASTATE COMMERCE.

From the Act itself it appears that it was the intention of the Montana Legislature to levy a license tax upon only the intrastate or domestic business of the company. The amount of the intrastate business and the amount of the tax is measured by the number of telephones for which a certain monthly rate is paid. Such monthly charge is for local service, that is, intrastate business entirely. By the express terms of the statute, therefore, the license tax is limited to intrastate business. No tax is levied upon the extra tolls for interstate or foreign business or even upon the extra tolls for intrastate business generally termed "long distance calls." The Act does not admit of any other construction.

We have been able to discover but one case in the United States which concerned a like statute. The Act in question is almost identical with the one considered by the Supreme Court of Utah in Ogden v. Crossman, 14 Utah 66, 53 Pac. 985. An ordinance of the City of Ogden, among other things, provided:

> "Every person or corporation who shall operate and maintain in Ogden City, any telephone instrument for which a rental charge is made, shall pay an annual license fee of $5.00 for each instrument so used."

It was claimed by the *Rocky Mountain Bell Tel. Co.*, the defendant in that case, that the ordinance was unconstitutional in that it was an interference with interstate commerce. The facts and substance of the court's opinion, are set out in the following quotation:

> "It appears from the agreed statement of facts that the said corporation operated and maintained said instrument in the store of Mr. Ash, for which he paid the company five dollars per month; that this payment gave Ash the privilege of talking with persons in different parts of the city, and for no other place; that, if Mr. Ash used the instrument in talking with parties out of the state, he paid the usual stipulated sum charged therefor, outside of the rental price paid for the instrument. It is evident the defendant corporation operated and maintained such instrument in Ogden City for a stipulated monthly rental, for business of a local character, which was confined strictly within the city lmits. For interstate business it made another and distinct charge, independent of the local rental business charge of five dollars per month. Lessors of such instruments had no right to use them outside of the city, unless they paid certain extra charges therefor, to which all others were subject. *It is evident that the ordinance was not intended to, and does not, apply to or affect in any manner the business of the defendant corporation which is interstate in its character, and that such ordinance was intended to, and does, apply to and effect only the local business of said defendant company done within Ogden City, as shown from the rental of the instrument for use in Ogden City alone. By engaging in a business of operating and maintaining such telephones in Ogden City, and making and receiving a rental charge for the use of the instruments therein, and for no other place, it became amenable to the ordinance. A business done wholly within a city is within the taxing power of the city. The defendant corporation is not exempt from the operation of the*

> *ordinance, and the payment of a license upon its instruments or business which arises and is conducted wholly within Ogden City, even though at the same time the defendant corporation may do a business or use its instruments in Ogden City for business which is in part interstate in its character. We are of the opinion that the ordinance does not affect or apply to this latter class of business, which is interstate in its character.* (Italics supplied). *Osborne v. State of Florida,* 164 U. S 650, 17 Sup. Ct. 214; *Postal Tel. Cable Co. v. City of Charleston,* 153 U. S. 692, 14 Sup. Ct. 1094; *City of Anniston v. Southern R. Co.* (Ala.) 20 South. 915; *Harrow Co. v. Shaffer,* 68 Fed. 750."

A similar question came before the Montana Supreme Court in *State v. Rocky Mountain Bell Tel. Co.,* 27 Mont. 394, 71 Pac. 311, which had before it section 4071 of the Political Code of 1895 as amended by the Laws of 1897, page 202, which provided:

> "Every person, corporation or association *doing business in this State* as a telephone company must pay a license in each county where such business is transacted, of 75c per year for each instrument in use." (Italics supplied).

Among other cases, the court cited the *Ogden City Case,* supra, and quoted with approval the portion of the opinion which we have italicized above against the claim that the commerce clause of the Constitution was violated. It is true that in this case the court held that there was no proof that any of the telephones in question were used exclusively in interstate commerce and that the burden of such proof was upon the Telephone Company. We understand, however, that the court was in accord with the reasoning of the Utah Court in the *Ogden City Case,*

supra. In addition to that case the court cited and quoted from *State ex rel. Beek v. Wagener,* 77 Minn. 483, 80 N. W. 633, 778, 46 L. R. A. 442, 77 Am. St. Rep. 681; *Osborne v. State,* 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99; 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Commonwealth v. Gagne,* 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 443; *Moore v. City of Eufaula,* 97 Ala. 673, 11 South. 921; *People v. Roberts,* 55 N. Y. S. 950. After comparing the authorities, the court said:

> "While there appears to be some conflict in the authorities, we are satisfied that the best considered cases fully sustain the views herein expressed.
>
> "Our conclusion therefore is that the evident intention of the legislature in passing Section 4071, above, was to impose the license tax of 75 cents on each telephone instrument used in purely local or intrastate business, and that as to instruments used in interstate business it was intended to have no application whatever."

Later, in *State v. Northern Pacific Express Company,* 27 Mont. 419, 71 Pac. 404, the court, in construing the language of Section 4074 of the Political Code 1895:

> "Every * * * corporation who engages as a common carrier in * * * conveying * * * express matter * * * from one place to another for hire * * * must procure a license * * *."

held that it was an attempt to impose a license upon the entire business of the company, a portion of which was interstate in character and it was therefore an interference with interstate commerce and void. The court said:

> "The statute *does not, by its terms,* attempt to make any discrimination between the local and inter-

> state business of the defendant company, and no such discrimination can be made under any fair construction of the language employed." (Italics supplied).

The court again speaking by Mr. Justice Holloway, in referring to the case of *State v. Rocky Mt. Bell Tel. Co.*, supra, said:

> "This court, in construing Section 4071 of the Political Code, which imposes a license tax upon every telephone company doing business *in this state,* held that by express terms the statute discriminated between local and interstate commerce, and that the manifest intention of the legislature that only local business should be subject to such license was clearly expressed."

We call attention to these cases by way of local background, as well as to show the construction which has been given by the Montana Supreme Court to a similar act at an earlier date. As a preface to a brief review of some of the cases decided by the Supreme Court of the United States, we may say that so far as it has come to our attention, this court has never, even in a minority opinion, questioned the right of the states to impose an excise tax on purely intrastate business of a public service corporation doing both an intrastate and an interstate business.

On the other hand, the principle that a state may, by appropriate legislation, levy a tax upon a corporation engaged in both intrastate and interstate commerce, if it is imposed solely on account of the intrastate business and is not increased because of the interstate business done, and no restriction is placed upon interstate business by

way of penalty, has been so frequently stated by this court that it is firmly established.

In one of the earlier cases, *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, decided in 1887, this court held that a single tax of 5 per cent of the gross receipts assessed under the laws of Ohio upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation but were returned and assessed in gross and without separation or appointment, was invalid in proportion to the extent that such receipts were derived from interstate commerce, but was otherwise valid; and that while the U. S. Circuit Court should enjoin the collection of the tax upon the portion of the receipts derived from interstate commerce, it should not interfere with those derived from commerce entirely within the state. The court arrived at this conclusion after an exhaustive review of its earlier decisions. In referring to the case of *The State Freight Tax*, 15 Wall. 232, it was said, page 424:

> "This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court wll act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce solely within its territory."

In *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, it was held that a state gross receipts tax of 8-10ths of 1 per cent against a domestic railroad corporation on ac-

count of transportation between points in the same state, but passing, during transportation, without the state, was not a tax upon interstate commerce, and did not infringe the provisions of the federal constitution. The court said:

> "Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchise, property or business of its own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet when the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. West. Union Tel. Co.*, 127 U. S. 411, 424."

In *Postal Tel.-Cable Co. v. Charleston*, 153 U. S. 962, it was held that a city ordinance, made under power conferred by a state statute, imposing a license tax of $500 upon a telegraph company upon business done exclusively within the city and not including any business done for the government of the United States, its officers or agents, was a valid exercise of the police power and was not an interference with interstate commerce. After reviewing the cases, the court said:

> "The express terms of the ordinance restrict the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.'

"It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the interstate messages are not between points within the city; and that, if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

"But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power."

In *Pacific Express Co. v. Seibert,* 142 U. S. 339, the court had under consideration a statute of Missouri, imposing a privilege tax of 2 per cent of the company's gross receipts from business done within the state in addition to the ad valorem tax paid on the company's tangible property, and providing for a penalty of $100 a day for delinquency in making its report and paying the tax, and prohibiting the company from carrying on intrastate business in the state while such tax was delinquent, was upheld as a valid exercise of the state's taxing power and not violative of the commerce clause of the federal constitution. The court said:

"We therefore concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

Osborne v. Florida, 164 U. S. 650, involved the validity of an occupation or license tax imposed by cities upon those pursuing diverse occupations and professions in so far as it affected express companies who were required to pay a tax of from $10 to $200 a year depending on the size of the city. As to express companies the state court had construed the act as applying only to intrastate and not to interstate business. As so construed, the supreme court held the act not violative of the federal constitution. In so holding, the court said:

> "It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. * * * *The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax.* It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. *It can conduct its interstate business without paying the slightest heed to the act,* because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state.

> *"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."* (P. 655—Italics supplied).

In this connection we desire to call attention to the language of the court in *Osborne v. State,* 33 Florida 102, (Affirmed in 164 U. S. 650) to the effect that a person or corporation in local business cannot be relieved from the provisions of the statute by an engagement at the same time in interstate commerce and that there is not a violation of the commerce clause if the person or corporation is free to carry on interstate commerce unaffected by the provisions of the act.

In *Pullman Co. v. Adams,* 189 U. S. 420, the court had before it a Mississippi statute, by which a tax was imposed on each sleeping and palace car company carrying passengers from one point to another within the state, $100, and 25c per mile for each mile of railroad track in the state over which the company ran its cars. Following its former decision in *Osborne v. Florida,* supra, and holding the tax valid, the court said, in part:

> "On the other hand, if the Pullman Company whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another with the state, the case is governed by *Osborne v. Florida,* 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

Again, in *Allen v. Pullman Co.,* 191 U. S. 171, it was held that a tax law of Tennessee, requiring that sleeping

car companies pay a tax of $3,000 per annum in lieu of all other except ad valorem taxes for one or more passengers taken up at one point within the state and delivered at another and transported wholly within the state and which did not refer to or affect the interstate business of the companies, would not be regarded as a disguised attempt to tax the privilege of engaging in interstate commerce, where under the laws of the taxing state, it was not compulsory for a corporation engaged in interstate commerce to carry on that part of its business which was wholly within the state, and was therefore not repugnant to the commerce clause of the federal constitution. In so holding, the court followed its former ruling in *Osborne v. Florida, supra,* and *Pullman Co. v. Adams,* supra.

In *Kehrer v. Stewart,* 197 U. S. 60, the Supreme Court considered a state law of Georgia which provided that there should be assessed and collected "upon all agents of packing houses doing business in this state, two hundred dollars in each county where said business is carried on." It was claimed that this tax was a violation of the interstate commerce clause; that it denied petitioner due process of law and the equal protection of the law. In upholding the law, the court said: (P. 69).

> "* * * but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the

> other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment."

This principle was recognized in *Crutcher v. Kentucky*, 141 U. S. 47, where the court said:

> "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state, would be open to no such objection."

This language was quoted by the court in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 22.

In *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576—the "Ohio Tax Cases," the court had under consideration the Ohio statute to the effect that each railroad doing business in the state was required to report annually to the tax commission its entire gross earning for the preceding year for business done within the state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. From such statement and other sources, the tax commission was required to find such gross earnings and certify the same to the Auditor of State, whereupon such auditor was required to charge for collection from each railroad company "a sum in the nature of an excise tax for the privilege of carrying on its intrastate business * * * by taking 4 per cent of all such gross earnings." The court, in affirming the action of the trial court in refusing to grant injunctions, said (P. 591):

> "In the third place it is insisted that the act, as applied to railroads, is a burden upon their foreign commerce.
>
> "* * * Certainly in the absence of a construction

> by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the federal courts ought not to place a construction upon the act that would render it unconstitutional."

In *St. Louis Southwestern Railway Company v. Arkansas ex rel. Norwood,* 235 U. S. 350, it was held that the annual franchise tax imposed by the Arkansas statute upon a railroad corporation "for the privilege of exercising its franchise in this state" of a specified percentage of the corporations outstanding capital stock represented by property owned and used in business transacted in the state, was not repugnant to the commerce clause of the federal constitution, as applied to a foreign railway company doing both interstate and intrastate business, where, *as construed by the state court,* such tax was upon the right to exercise the privilege to transact intrastate business in corporate form, the amount of the tax being fixed solely by reference to the property of the corporation that was within the state and used in business transacted within the state, excluding any imposition upon or interference with interstate commerce. The statute provided that a foreign corporation failing to pay the tax, would forfeit its right to do business in the state. The validity of the tax was attacked by a foreign railway corporation doing both interstate and intrastate business on the ground, among others, that by such forfeiture its interstate business would be unlawfully interfered with in violation of the commerce clause of the constitution. In upholding the act, the court said (P. 370):

"In view of all these considerations we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the act, that Section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view, it is obvious, from what has already been said, that the tax does not amount to a regulation of or a burden upon interstate commerce."

In *People ex rel. Cornell Steamboat Company v. Sohmer*, 235 U. S. 549, the court held an annual excise tax or license fee equal to 5-10ths of 1 per cent upon gross earnings from transportation originating and terminating within the State of New York, imposed by that state on transportation and transmission corporations and associations for the privilege of carrying on business in the state in a corporate or organized capacity, was not an invalid regulation of commerce as applied to a navigation company engaged in the business of towing upon the Hudson River, under the authority of a license granted by the United States, since the charge was not upon the navigation of the river, but upon the doing of business within the state as a corporation of the state, and was not a taxation of interstate commerce. The court stated (P. 561):

"We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the state, and that the return on which the tax was assessed did not involve the revenues of commerce among the states and this contention must be rejected."

The court held in *Postal Telegraph-Cable Co. v. City of*

Freemont, 255 U. S. 124, that an ordinance which levied a license tax upon the businesses and occupations within the city, including telegraph lines and upon the latter a tax of $60.00 per year on the business of sending messages from the city to any place in the state and receiving messages transmitted from any place in the state to the city, was not unconstitutional because a burden upon interstate business merely because the local business was unprofitable since the state law afforded a means to prevent the tax from burdening the interstate business through an application to increase intrastate rates of which the company had not sought to avail itself.

In *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U. S. 252, the court considered an ordinance by the city of Richmond which provided an annual license fee of $300.00 for the privilege of doing business within the city of Richmond but not including any business done to or from points without the state. It was claimed that the cost of doing intrastate business at Richmond was greater than the receipts from it and that since the taxes must be paid, if at all from interstate commerce they constitute such a burden upon that commerce of the company as to render them unconstitutional and void. The court said there was *no clear and convincing evidence that the tax falls upon interstate commerce*, which is necessary to justify the finding that the ordinance is unconstitutional and void.

In *Raley & Bros. v. Richardson*, 264 U. S. 157, the court considered a statute of Georgia which imposed a flat tax of $100 upon any broker or commission merchant buying

or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The court held that this law did not violate the interstate commerce clause and it was not void under the equal protection clause of the Fourteenth Amendment. The court cited with approval the decision in the case of *Kehrer v. Stewart,* supra, and speaking by Justice Sutherland, said:

> "Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business."

The principle that a state may tax intrastate business is recognized in a late case of this court, *Sprout v. South Bend,* 277 U. S. 163. There the court considered an ordinance of South Bend, Indiana, which prohibited the operation on its streets of any motor bus for hire unless licensed by the city. Sprout operated a bus between points within South Bend and the City of Niles, Michigan. He paid the state registration fee but refused to pay the license fee of $50.00. Sprout made stops habitually within Indiana, in order to permit passengers from South Bend to leave the bus before the state line was reached, although they paid the fare to some Michigan point. The court, in holding the ordinance void, said:

> "The ordinance made no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. * * * (P. 167).
>
> "A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *Postal Telegraph Cable Co. v. Charleston,* 153 U. S. 692; *Os-*

borne v. Florida, 164 U. S. 650; *Kehrer v. Stewart*, 197 U. S. 60; *Watters v. Michigan*, 248 U. S. 65; *Raley & Bros. v. Richardson*, 264 U. S. 157. Compare *Interstate Busses Corporation v. Holyoke Street Ry. Co.*, 273 U. S. 45; *Arnold v. Hanna*, 276 U. S. 591. And it may delegate a part of that power to a municipality. Compare *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 257. *But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business;* that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. *Leloup v. Port of Mobile*, 127 U. S. 640; *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Adams Express Co. v. New York*, 232 U. S. 14, 30; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams v. Talladega*, 226 U. S. 404, 417; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252." (170-171—Italics supplied).

While recognizing the right of the state to tax intrastate commerce, it will be seen that no distinction was made in the ordinance between intrastate and interstate commerce; that a flat license fee was charged; and that such fee was not charged for police regulation or for construction and maintenance of highways.

In *East Ohio Gas Company v. Tax Comm.*, 283 U. S. 465, the court considered and held valid an excise tax upon a gas company for the privilege of carrying on an intrastate business, the amount to be computed upon the gross receipts of the company on its intrastate business. The court quoted from the opinion in *Sprout v. South Bend*, which we have quoted above, and stated further (P. 472):

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in intrastate commerce."

In the light of these cases it may be fairly stated that the license fee of the Montana statute is imposed solely on account of the intrastate business of the telephone company, measured by the number of telephones operated for local use for which a monthly rate is charged; that the amount of the tax is not increased because of the interstate business done; and that if the telephone company chose to engage exclusively in interstate business it would not be subject to the imposition of the tax as it need pay no license tax for its long distance calls, even those long distance calls which are entirely intrastate and which constitute the greater revenue for long distance calls. The company could discontinue the intrastate business without withdrawing from the interstate business.

After a review of the foregoing cases, we believe that the conclusion of Judge Garrecht, Circuit Judge, (R. 23) 7 Fed. Supp. 12, 14, is correct:

> "The license in question is nothing more than a tax. The penalty provided is but a mode of enforcing its payment. There is no restriction upon business in interstate commerce. From the record it appears that the fee or tax is imposed solely on account of the intrastate business. The amount exacted is not increased because of the interstate business done. One engaged exclusively in interstate commerce would not be subject to the imposition. The plaintiff could discontinue the intrastate business without withdrawing

also from interstate business. It is assumed in the opinion that to require the plaintiff, in order to save the tax, to discontinue its intrastate business would impose too great a burden upon it. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power. Resultant hardship is not within their province to redress. *Postal Telegraph-Cable Co. v. Charleston City Council,* 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871; *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S. 252, 257, 39 S. Ct. 265, 63 L. Ed. 590."

A. IT IS CLAIMED THAT THE TAX IS VOID BECAUSE IT IS LEVIED UPON INSTRUMENTALITIES USED IN INTERSTATE COMMERCE.

But this is looking at the form and ignoring the substance of the law. It is apparent that the telephone instruments are mentioned specifically in the act simply for the reason that they determine the amount of intrastate business of a telephone company, minus, of course, the tolls for long distance intrastate calls. Each telephone registers the amount of intrastate business for that telephone. The act could as well have fixed and measured the amount of the tax by the number of persons who paid a monthly rate for the local use of the telephone. In that event it could not be said that the tax was levied upon such persons.

This court in *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, held that in determining whether a statute does or does not burden interstate commerce, the court will look beyond mere form and consider the substance of things.

> "This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms,

but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show." (P. 27).

In *Cudahy v. Hinkle,* 278 U. S. 460, 470, Mr. Justice Brandeis, in a dissenting opinion, quoted from *Postal Telegraph-Cable Co. v. Adams,* 155 U. S. 688, 698, as follows:

> "The substance and not the shadow determines the validity of the exercise of the (taxing) power."

The majority opinion of the lower court declared:

> "The suit is indistinguishable in principle from the *Adams Express Case,* 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483, and the *Continental Oil Case,* 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, the rule of which condemns the tax for repugnancy to the commerce clause of the Federal Constitution (Const. Art. 1, § 8, Cl. 3)."
>
> 7 *Fed. Supp.* 12, 13.

In the case of *Adams Express Co. v. New York,* supra, the court passed upon a group of ordinances of the City of New York, as applied to the Adams Express Company, an unincorporated association engaged in interstate commerce as a common carrier of packages. The Express Company did both an intrastate and an interstate business, the latter, however, in the number of packages carried, comprising 98 per cent of the total business transacted in New York City. Section 308 of the ordinance provided for an annual license fee, for each express wagon, of $5.00, and for each driver, 50c. Section 305 required that business of "expressmen" and others "must be duly licensed as herein provided." Section 306 read:

> "No person shall engage in or carry on any such business without a license therefor under a penalty

of not less than two dollars, nor more than twenty-five dollars for each offense, and for the purposes of this ordinance the term person shall include any human being or lawful association of such." (232 U. S. 24, 25).

The Express Company brought suit to restrain the enforcement of the ordinances on the ground that they constituted an unconstitutional interference with interstate commerce. The court held the ordinances void as imposing a burden upon interstate commerce but, as we understand the decision of the court, so held for the reason that Section 308 was linked with Section 305 and 306, and made the obtaining of a license as a condition precedent to conducting the interstate business of an express company. The court said:

> "But, if the above mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional." (P. 31).

And again:

> "It would seem to follow, necessarily, that the annual license fees prescribed by § 308 * * * cannot be exacted, so far as the interstate business is concerned. * * *
>
> "The provisions of § 308 are inseparably connected with those of §§ 305 and 306. The sums fixed 'for each express wagon' and 'for each driver' measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor cannot be compelled. (P. 33).
>
> "* * * a state law is unconstitutional and void which requires a party to take out a license for carry-

ing on interstate commerce, no matter how specious the pretext may be for imposing it." (P. 31).

Apparently the court held the ordinances void for the reason that they made the taking out of a license a condition precedent to carrying on interstate commerce. There was no attempt in the ordinance to distinguish between wagons used in intrastate commerce, those used in interstate commerce or those used in both. Under the Montana statute there is no condition precedent that the tax be paid before the telephone company may engage in interstate business. The company is free to engage in interstate business whether it pays the tax or not.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, an act of the legislature imposing an excise tax of 2c upon each gallon of gasoline sold or used and an annual license tax of $50.00 for each distributing station or place of business, was considered. The statute was held invalid on the ground that it was inseparable and that by both its terms and its legal operation and effect the tax was imposed generally upon the entire business, including interstate commerce, as well as domestic commerce. In this case the court said:

> "The applicable rule is that laid down in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, where, in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts

derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 476-477; *Leghigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 200-201; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 697; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31." (PP. 646-647).

On the question of severability after stating its hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the federal constitution, the court said:

> "The act, in its 2d section, requires every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it.
>
> "The subject taxed is not in its nature divisible, as in the case of the excise tax. *The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment.* By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. *United States v. Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 99; *Poindexter v. Greenhow*, 114 U. S. 270, 304-305; *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 636." (Italics supplied).

As hereinbefore pointed out, the Montana Supreme Court in *State v. Rocky Mountain Bell Telephone Company*, 27 Mont. 394, 71 Pac. 311, in considering a similar act, construed it as applying only to intrastate busi-

ness and quoted the Utah Supreme Court in *Ogden City v. Crossman,* 17 Utah 66, 53 Pac. 985, where the Utah Court construed an almost identical statute as applicable to and affecting local business only and not applicable to or affecting in any manner interstate commerce.

In a later case, *Sonneborn Bros. v. Cureton,* 262 U. S. 506, 519, the court said this:

> "The main point decided in the *Bowman Case* was that a license tax law which imposed a *lump tax as a condition of doing business,* part of which it was unlawful under the Federal Constitution to tax, must be declared void, though the other part of the business might have been properly the subject of such a tax." (Italics supplied).

The statute considered in the *Bowman Case,* levied a tax of $50 against all distributing stations. The statute in the case at bar levies a tax of $2 on such telephone instruments which pay a certain specified rate per month. Telephone instruments for which a monthly rate is not charged, in other words, those not used for intrastate business and instruments for which the monthly charge is under a specified rate, are exempt. In the *Bowman Case* no attempt was made to segregate interstate and intrastate business and to tax the latter but a lump sum was levied against all stations. In other words, it amounted to a gross tax against all of the business of the company and therefore was a burden upon interstate commerce. The court has frequently held such laws unconstitutional.

State Freight Tax, 15 Wall. 232, 276, 277;
Fargo v. Michigan, 121 U. S. 230, 244;
Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 336;

Leloup v. Port of Mobile, 127 U. S. 640, 648;
McCall v. California, 136 U. S. 104, 109;
Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 227;
Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

On the contrary, in the case at bar, considering the substance and not the form of the act, it is clear that it was the intention of the legislature to tax only intrastate business and that the telephone instruments are selected solely for the purpose of measuring or fixing the amount of tax on such intrastate business. In effect, it is exactly the same as having the telephone company report the gross revenue for intrastate business and then levying a tax thereon. Whether the number of instruments used for intrastate business or the gross revenue from intrastate business of these instruments is selected to measure the tax, is immaterial. The purpose and effect is the same, if we have regard to substance rather than form.

This court has stated that the question in each case is a practical one and must be decided on the special facts in each case. It was said in *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290, 295:

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate."

In that case the court was considering an Illinois law

for taxing foreign corporations for the privilege of doing local business, which based the tax upon the capital stock actually represented by property located and business transacted within the state. The court held that there was plainly no intent to tax interstate commerce and that the tax assessed under it was not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. We consider the following language of the court as pertinent:

> "If this same amount of tax had been imposed upon such a manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of (142 U. S. supra, p. 229). Or if the State had imposed an income tax, a part of which would have been derived from the net profits on this same interstate business, no valid objection could have been made to it. (*United States Glue Co. v. Oak Creek*, supra. *At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant and it is therefore constitutional.*" (P. 296). (Italics supplied).

We should like to call attention to the following language used by the court in this case:

> "* * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of

the cases so holding must be regarded as a settled exception to the general rule. (Citing Cases). The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, *or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.*" (PP. 294-295). (Italics supplied).

During the year of 1933, after March 16, the record shows that more than two-thirds of the telephone instruments were not used even once for interstate or foreign purposes. (R. 34). It is common knowledge that the ordinary telephone is seldom used for long distance calls either intrastate or interstate. True, the telephone instruments have a potential use for such business but potential use or even occasional use is remote, uncertain, indefinite and incidental and should not justify their classification as instrumentalities of interstate or foreign commerce, so as to prevent a state from levying a license tax thereon when in a given year most all such telephone instruments are, in fact, used exclusively and the others almost exclusively for intrastate business and the statute on its face purports to levy a license tax only for such intrastate use or upon the intrastate business of a telephone company measured by such use.

B. ALTHOUGH AN EXCISE TAX MAY HAVE AN INDIRECT AND INCIDENTAL EFFECT UPON INTERSTATE COMMERCE, IT IS NOT FOR THAT REASON UNCONSTITUTIONAL.

Ad valorem taxes upon property used in interstate commerce do indirectly and incidentally affect or burden in-

terstate commerce yet it has never been held that such taxes are for that reason in contravention of the commerce clause of the constitution and void. In *Virginia v. Imperial Coal Sales Company, Incorporated*, ... U. S. ....., decided November 5, 1934, the court, speaking by Mr. Chief Justice Hughes, said:

> "Property having its situs within the taxing state is not exempt from a non-discriminatory property tax merely because the property is used in interstate commerce. Corporations engaged in interstate commerce should bear their proper share of the burdens of the government under whose protection they conduct their operations, and non-discriminatory taxation of their property although used in interstate commerce, as this Court has frequently said, affects that commerce only incidentally and is not inconsistent with the constitutional immunity from the imposition of direct burdens. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 696; *Adams Express Co. v. Ohio*, 165 U. S. 194, 220; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *United States Express Co. v. Minnesota*, 223 U. S. 335, 344; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 166, 167; *Eastern Air Transport v. Tax Commission*, 285 U. S. 147, 152."

The same is true of license taxes for police regulations. See *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 492; *Western Union Telegraph Company v. James*, 162 U. S. 650; *New York Etc. Rd. Co., v. New York*, 165 U. S. 628; *Lake Shore Etc. Co. v. Ohio*, 173 U. S. 285; *Atl. & Pac. Rd. Co. v. Larabie Flour Mill Company*, 211 U. S. 612; *Houston & Texas R. Co. v. Mayes*, 201 U. S. 321; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334.

The same rule applies to excise taxes upon local or domestic business. Such taxes, while they may indirectly or incidentally affect interstate commerce, are not a direct burden and not a violation of the interstate commerce clause.

In *Allen v. Pullman Co.*, 191 U. S. 171, 181, this court said:

> "* * * The corresponding right of the state to tax and control the internal business of the state, altho thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."

This language was quoted in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 44; see also *Osborne v. Florida*, supra, and the other cases cited in this brief, under I, and *Hump Hairpin Co. v. Emmerson*, supra, and the language quoted under "A" herein.

In *Boston & Maine R. Co. v. Armburg*, 285 U. S. 234, 238, this court said:

> "The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. *Sherlock v. Alling*, 93 U. S. 99, 103; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 26; also *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 137, 138."

While the record shows that about one-third of the telephone instruments were used in interstate calls some time between March 16, 1933, and January 1, 1934, it is common knowledge that the number of times a telephone is used for interstate use is very small compared to the num-

ber of times a telephone is used for local use. Doubtless the number of such calls is but a fraction of 1 per cent. Even if the tax be considered to be upon the telephone instruments (it is our view as elsewhere stated that it is so in form only and that the instruments are named merely to measure the amount of the intrastate business to be taxed), the effect upon interstate commerce would be only incidental or remote, "so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect it." (*Hump Hairpin Co. v. Emmerson*, 258 U. S. 290). It is not any less indirect or remote than was the license tax on gasoline in Wyoming considered by this court in *Edelman v. Boeing Air Transp.*, 289 U. S. 249, where it was held that a state license tax of 4 cents per gallon on gasoline used or sold, may constitutionally be imposed on gasoline that has been imported and stored by an air-transport company and is drawn from the tanks to fill the airplanes that use it in interstate commerce, if the use to which the tax is applied is in the withdrawal of the gasoline from the tanks and the placing of it in the fuel tanks of the planes, before its use in interstate transportation begins. The court pointed out that the interpretation given to the statute in that case was not such as was given in the case of *Helson v. Kentucky*, 279 U. S. 245, where the tax was levied on gasoline used in interstate commerce. The Montana license tax might be considered a tax for the use of telephone instruments for interstate business. No tax is levied for the use of the instruments within the state for interstate commerce and hence does not fall within the prohibition stated in the *Helson Case*.

In the *Edelman Case,* the court said:

> "As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations." (P. 252).

To the same effect was the decision in *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, concerning a similar tax at 2c per gallon on gasoline sold or stored even though the gasoline was later used in interstate commerce. The court in that case, said:

> "The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport v. Tax Commission,* 285 U. S. 147)" (P. 268).

In *Eastern Air Transport v. Tax Comm.,* 285 U. S. 147, it was held that a 6 cent per gallon tax on sales of gasoline was not a direct burden upon interstate commerce even though the gasoline was used in planes engaged exclusively in interstate transportation. Quoting from *New Jersey Telephone Co. v. Tax Board,* 280 U. S. 338, 346, "it is elementary that a state may tax property used to carry on interstate commerce," the court distinguished that case from the *Helson Case,* on the ground that in the latter case "the court found that the tax was laid directly upon the *use* of the gasoline in interstate transportation." The court said further:

> "A non-discriminatory tax upon local sales in such

> cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." (P. 153).

In effect, the Montana tax, even if it be considered to be upon the telephone instruments, is nothing more than *a tax upon the local use of such instruments*; it is not a direct burden upon interstate commerce. No tax is laid upon the *use* of telephones for long distance calls or upon the tolls from such calls. The company need take out no license and pay no tax for doing an interstate business nor is the payment of the tax for the local use made a condition precedent to the use of a telephone for interstate purposes. A *practical* interpretation should be given to the act. The words of Mr. Justice Stone, in his concurring opinion in the *Helson Case*, are apt:

> "Nor can I find any *practical* justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, *which is neither aimed at nor discriminates against interstate commerce.* It 'affects commerce among the states and impedes the transit of persons and property from one state to another *just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' Delaware Railroad Tax*, 18 Wall. 206, 232." (P. 253—Italics supplied).

C. THE TELEPHONE COMPANY MAY DISCONTINUE ITS INTRASTATE BUSINESS WITHOUT WITHDRAWING ALSO FROM INTERSTATE COMMERCE.

It was argued in the court below that,

> "By virtue of the grant of the right under the Montana Constitution to construct, maintain and operate its telephone system, and the acceptance of that grant by the company, the company is required to conduct its local business in Montana, and cannot abandon it while continuing to conduct interstate and foreign business, and by virtue also of the inherent character of the telephone business, the company could not undertake to furnish the extensive facilities for interstate communication without maintaining that system also for purpose of intrastate communication. Therefore, the imposition of this tax is a burden upon its interstate and foreign commerce."

Two questions are presented by this argument, one of practicability and the other of legal right:

1. Has the telephone company the legal right to discontinue intrastate business without withdrawing also from interstate commerce? Section 14, Article XV, of the Montana Constitution, reads:

> "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. * * *."

We find nothing in the Constitution or Laws of Montana, which would compel the telephone company to operate its intrastate business at a loss, should the telephone company determine that it is not profitable to pay the tax

and therefore discontinue its intrastate business. The permissive character provided by the Constitution does not create any obligation on the part of the company to operate at a loss. If the company can not profitably continue its operations, it may discontinue them. To compel it to operate at a loss would be in violation of the due process clause of the Constitution. This question came up squarely in *Railroad Company v. Eastern Texas R. R.*, 264 U. S. 79, where the court considered the question whether the Eastern Texas Railroad had the legal right to dismantle and abandon its road when it was not profitable to continue. It was contended that the company did not have the right to withdraw from intrastate commerce until its charter expired. It was argued for the company, on the other hand, that the state statutes neither prohibited the dismantling and abandonment of the road nor lay upon the company the duty to operate it at a loss and that if they did, they deprived the company of its property without due process of law and in that respect were in conflict with the Fourteenth Amendment of the Constitution of the United States. In rejecting the view of the Railroad Company and sustaining that of the company, the court said:

> "The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate

basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. *Brooks-Scanlon Co. v. Railroad Company of Louisiana,* 251 U. S. 396, 399; *Bullock v. Railroad Commission of Florida,* 254 U. S. 513, 520; *State ex rel. Cunningham v. Jack,* 113 Fed. 823; s. c. 145 Fed. 281; *Iowa v. Old Colony Trust Co.,* 215 Fed. 307, 312; *Northern Pacific R. R. Co. v. Dustin,* 142 U. S. 492, 499; *Commonwealth v. Fitchburg R. R. Co.,* 12 Gray, 180, 190; *State v. Dodge City, etc., Ry. Co.,* 53 Kan. 329, 336." (P. 85).

2. But Judge Bourquin, speaking for the majority in the court below, apparently conceding the legal right of the telephone company to discontinue its intrastate business without withdrawing also from its interstate business, stated that it would not be practicable to do so. He said that this court, in the *Sprout Case,* 277 U. S. 171, speaking by Mr. Justice Brandeis, in stating, in order that a fee or tax be valid, it must appear that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business, evidently meant that "withdrawal to escape the tax must be practicable."

As we understand the case of *Sprout v. South Bend,* supra, the tax was held void because it did not appear that it was imposed solely on account of the intrastate busi-

ness. (See syllabus, paragraph 6, 277 U. S. 163). The practicability of discontinuing the intrastate business while continuing the interstate business was not considered by the Supreme Court of Indiana, nor was it discussed by this court, for the court said:

> "The Supreme Court of Indiana, far from construing the ordinance as applicable solely to business engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged." (P. 171).

In *Pullman v. Adams,* 189 U. S. 420, a tax of $100 on sleeping cars carrying passengers from one point to another within the state, and 25c per mile for each mile of track over which the company ran its cars, was upheld on the assumption that the company would be held free to abandon the business taxed, if it saw fit. The court said:

> "If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in *Crutcher v. Kentucky,* 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne v. Florida,* 164 U. S. 650. *The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce.* * * *
>
> "* * * If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is in-

valid." (PP. 421-422—Italicts supplied).

The court later in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 41, said of the *Adams Case*:

> "So, that what was actually decided in the *Adams Case* (*Pullman Co. v. Adams*, 189 U. S. 420, 429) was that the company was under no obligation to take local passengers, but if it chose to do that kind of business the privilege for doing it could be taxed by the State. The court did not hold that the State could, in any form, *directly* burden interstate commerce. It really held to the contrary."

It is evident that in these cases the practicability of discontinuing intrastate commerce while continuing interstate commerce, was not considered. It must be conceded that railroad companies and sleeping car companies use the same facilities for both intrastate and interstate commerce and that it would be just as impracticable for them to discontinue the intrastate business as it would be for the telegraph company to do so. It would seem, therefore, that what the court had in mind in the *Sprout Case,* supra, was that one doing an interstate and intrastate commerce could not be taxed for the intrastate commerce unless he is *legally free* to withdraw from the latter so as to avoid the burden of the tax. If the telephone company has linked its interstate business to its intrastate business so that it cannot profitably continue the latter, it is no fault of the state's and the company should not for that reason avoid the tax. Appellee would revise the language of the *Sprout Case* so that it would read, 'but in order that a fee or a tax may be valid, it must appear * * * that it would be *practicable*, for the person taxed to discontinue the intrastate business without with-

drawing also from the interstate business.'

If this is what the court meant, it would seem to be impossible to tax the intrastate business of any railroad, express, sleeping car, telegraph, telephone company, or other public service corporations as it would certainly be impracticable for any of them to discontinue intrastate business while continuing interstate business for the same instruments and facilities are undoubtedly used in both. No reason, however, is given why it should discontinue its intrastate business to avoid payment of the tax thereon. If it is argued that the intrastate business would be unprofitable on account of the tax, it may be answered that the company has its proper remedy and that it may increase its rates so that the business may be profitable.

D. IT IS CLAIMED THAT THE ACT IMPOSES A BURDEN UPON INTERSTATE COMMERCE FOR THE REASON THAT IT REQUIRES THE TAX TO BE WHOLLY PAID BY THE COMPANY AND DOES NOT PERMIT THE TAX TO BE PASSED ON TO THE CONSUMER AS AN OPERATING EXPENSE.

True, the original act contained a clause to the effect that the rates charged the patrons and users shall not be affected by the tax but that it shall be borne entirely by the owning and operating concern. This clause, however, was eliminated in the amendment provided by Chapter 54, Laws of 1933-34, (See Appendix) which merely provides:

> "No bill, statement or tax rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount or account or by reason of the license tax imposed by this act."

If this point is well taken so far as the first act is con-

cerned and that part of the act is unconstitutional and void, the rest of the act may nevertheless stand. It is apparent that the legislature would have passed the first act without this provision as the same legislative assembly did so within a year following the passage of the first act. The rule is stated in 59 C. J. 639:

> "A statute may, however, be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected, and this rule applies, even though the constitutional and unconstitutional parts are in the same section of the act; * * *."

We call attention to the great number of cases from this court, as well as the federal and state courts, cited in footnote 13 in support of the above.

Furthermore, it does not appear that the appellee has made application to the Public Service Commission of Montana, for the purpose of increasing its rates as provided by Chapter 260, Part III of the Political Code of Montana, R. C. M. 1921, on the theory that the taxes should have been charged to operating expense.

See also *Postal Telegraph-Cable Co. v. City of Freemont*, 255 U. S. 124, 41 Sup. Ct. Rep. 279.

If such tax may be included in the operating cost and passed on to the user or subscriber (there being nothing in the second act to prevent it, and that part of the original act which forbids it, being unconstitutional), then there is no force to appellee's argument. There would be no reason why appellee should consider abandoning its intrastate business. For all practical purposes the tele-

phone company merely becomes a tax collector for the State of Montana, and it has no reason to complain. There is no reason why it should operate the two fanciful systems—one interstate and one intrastate, as argued in the court below.

E. A SIMILAR ACT HAS BEEN CONSTRUED BY MONTANA COURT.

As pointed out herein, in *Ogden City v. Crossman*, 17 Utah 66, 53 Pac. 985, the Utah Court, in construing an ordinance almost identical with the Montana statute, which ordinance provided for a license fee of $5.00 for each telephone instrument for which a rental charge is made, held that the ordinance was not intended to, and did not apply to, or affect in any manner, business which is interstate in character and that it was intended to, and did apply to, and affect only the local business within Ogden City, *(as shown from the rental of the instrument for use in Ogden City alone")*; and that by operating and maintaining such telephones in Ogden City "and making and receiving a rental for the *use of the instruments therein,* and for no other place," the company became amenable to the ordinance, since a business done wholly within a city was amenable to the taxing power of the city. The court declared:

> "The defendant corporation is not exempt from the operation of the ordinance and the payment of a license upon its instruments or business which arises and is conducted wholly within Ogden City, *even tho at the same time the defendant corporation may do business or use its instruments in Ogden City for business which is in part interstate in its character.*

> We are of the opinion that the ordinance does not affect or apply to this latter class of business which is interstate in its character." (Citing *Osborne v. State of Florida*, 164 U. S. 650; *Postal Tel. Cable Co. v. City of Charleston*, 153 U. S. 692, and other cases). (P. 76—Italics supplied).

Several years later, the Montana Supreme Court, in *State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394, 71 Pac. 311, had occasion to construe a statute which read:

> "Every person * * * doing business in this state as a telephone company must pay a license, in each county where such business is transacted, of 75 cents per year for each instrument in use."

A comparison shows that the attempt to discriminate between intrastate and interstate business was less apparent in that statute than was the attempt in the Ogden City ordinance and the present statute, yet the Montana Court held that this statute *by express terms discriminated between local and interstate business* and that it was the intention of the legislature that only local or intrastate business should be subject to the license tax. (See also *State v. Northern Pacific Express Co.*, 27 Mont. 419, 425, 71 Pac. 404, where the court, after reviewing the cases, including the *Ogden City Case*, referred to the former case of *State v. Rocky Mountain Bell Tel Co.*, as so holding).

By giving the statute that construction the Montana Court held that it meant the same as the Ogden City ordinance, and quoted at length from the *Ogden City Case*, including the language we have set out above. In other words, the court held that the statute was not intended to, and did not apply to, or affect in any manner business

which is interstate in character. The court said:

> "It is to be presumed that in enacting Section 4071 above, and in using therein the terms '*doing business in this state*,' the legislature did so in view of the constitutional provision conferring upon congress the sole power to regulate interstate commerce, and it will not be implied that it intended to go beyond its lawful powers, and in the absence of express statutory terms directly contravening those provisions." (P. 401—Italics supplied).

After reviewing and comparing the cases, the court quoted from *Osborne v. State of Florida*, supra:

> "Those expressions are to be viewed with reference to the circumstances under which the supreme court of the United States was then speaking. The state courts which it was reveiwing had each declared, in effect, that these statutes were binding upon and effectual as to companies as doers of interstate business, or, in other words, were a bar to their doing interstate business, without having complied with their requirements. *This construction has become, in so far as the federal tribunals were concerned, binding upon the federal court as to the effect of each statute within the state enacting it, as much as if it had been expressly stated in the act.*" (P. 404—Italics supplied).

Regarding the construction given to its statute by a state court, this court in the *Osborne Case* said:

> "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state court to the statutes of its own state. *Leffingwell v. Warren*, 2 Black, 599; *People v. Weaver*, 100 U. S. 539, 541; *Noble v. Mitchell*, 164 U. S. 367, 372, and cases there cited." * * * (P. 654).
>
> "Upon the construction given it by the state court

the statute does not violate any provision of the Federal Constitution, and the judgment of that court is, therefore, affirmed." (P. 656).

See also *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576 (supra); *St. Louis Southwestern Railway Co. v. Arkansas*, 235 U. S. 350 (supra); *Campbell v. City of Olney*, 262 U. S. 354; *In re Floyd and Hayes*, 225 Fed. 262, 265.

We submit that if the Montana Court could hold that the earlier statute (Section 4071) by express terms discriminated between local and interstate business, that it would find no difficulty in so construing the present statute.

F. THE COURT ERRED IN FINDINGS OF FACT. SPECIFICATION OF ERRORS I-III.

Under the view we have taken of this question, supra, it is not material whether the telephone instruments used exclusively or almost exclusively for intrastate commerce may occasionally also be used or have a potential use for interstate messages, since the license tax is, in substance, upon intrastate commerce, the amount thereof being measured by the number of instruments used within the state for intrastate business.

On May 29, 1934, when the court made its findings of fact and rendered its decree enjoining the state from the collection of the tax, the record shows (R. 34) that more than two-thirds of the telephone instruments owned and used by appellee in Montana, for which a monthly rate of the amount specified in the original act was paid, had not been used even once for interstate or foreign messages from March 16, 1933, when the original act became effective, to the end of the year. Until a telephone instrument

is actually used in interstate or foreign commerce, it could hardly be classified as an instrumentality of interstate or foreign commerce and the court therefore erred in finding that all of the telephone instruments were instrumentalities of interstate commerce in 1933. Even if it be assumed that those telephone instruments (the exact number of which was not shown) actually used one or more times in interstate or foreign commerce, should not be required to pay the tax, it does not follow that the collection of the tax should be enjoined as to those not so used.

The record, of course, does not show the number of telephones used in interstate or foreign commerce in 1934. Since it is likely that more than half of them were not so used, and since many of them may not be so used for many years, and since some of them may never be so used, we believe the court erred in finding (paragraph 9, Findings of Fact; R. 25; Specification of Error II) that "all the telephones" are instrumentalities of interstate or foreign commerce. If the use determines the character of the instrumentalities then there was no proof that all the telephone instruments were instrumentalities of interstate or foreign commerce. The burden of proof was upon appellee. (*State v. Rocky Mountain Bell Tel. Co.*, 27 Mont. 394). *A potential use, or even an occasional use for interstate or foreign commerce, is too remote, indefinite and indirect to permit such instruments to be classified as instrumentalities of interstate or foreign commerce, when, in fact, such instruments are used exclusively or almost exclusively for intrastate commerce.* No construction, in this respect, has been given to the act by the officials who collect

the tax or by the Supreme Court of Montana.

If in its finding, paragraph 8, Findings of Fact (R. 25, Specification of Error I), the court used the word "may" as meaning "can", having reference to potential use, then possibly there is evidence to support it. If, on the other hand, the court used it as expressing an immediate probability that all telephones would be used in interstate or foreign business, then we believe there is not sufficient evidence to support it.

We maintain that it was not material to find whether it was possible or practicable for appellee to discontinue its intrastate business without withdrawing from its interstate or foreign business, but, if it was, then the evidence was insufficient to support the finding that "plaintiff could not discontinue its intrastate business and operations in Montana, without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business." (Specification of Error III; R. 26). We shall not review the evidence as it is brief (R. 32-45) but at most it would show a possible inconvenience to the appellee. Aside from the conclusion of R. M. Morris, the sole witness for appellee, to which objection was made (R. 39), we believe there is not sufficient evidence in the record to support such a broad and comprehensive finding by the court.

The court below granted a permanent injunction against the enforcement of the tax on the sole ground that it was in violation of the commerce clause of the United States Constitution. Other questions were presented by the

pleadings and briefs but so far as the opinion of the court shows, were not determined by the court below. Since, however, other legal questions were presented by the pleadings and were argued, we shall consider them briefly.

II

IMPAIRMENT OF THE OBLIGATION OF A CONTRACT

It is claimed that the statute impairs the obligation of a contract existing between the Telephone Company and the State of Montana, which resulted from the acceptance by the company of the grant of the right to construct, maintain and operate its system and conduct its business in Montana, and that the impairing of such obligation is in violation of Section 10, Article I, of the Federal Constitution. We know of no case holding that the state cannot collect a just and proper and otherwise valid tax on the intrastate business of a public service corporation doing business in the state under a permissive charter authorized by Section 14, Article XV, of the Montana Constitution, (See I. C. herein) on the theory that to do so would impair the obligation of a contract. There does not exist any contract between the Telephone Company and the State of Montana, by which the state is prevented from levying a proper tax unon the company. Such power can never be relinquished or suspended by the state. Section 7, Article XII, of the Montana Constitution, provides:

> "The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal

property owned or used by them and not by this constitution exempted from taxation."

No case was cited below by the appellee, holding that the state's power to levy a tax is limited by the clause in the Constitution which forbids the impairment of the obligation of a contract. The Telephone Company cannot claim immunity from taxation by reason of any such constitutional provision or by reason of a statutory grant or contract arising from a charter to do business in the state.

III

EQUAL PROTECTION OF THE LAW

It is claimed further by the appellee that the statute is unconstitutional because it is denied the equal protection of the law guaranteed by the Fourteenth Amendment, for the reason that some of the telephones, those for which a sum less than a certain rate per month is charged, are exempt, and for the reason that the original act contained a graduated scale. (Section 1, Chapter 174, Laws of 1933—Appendix). This question has been before this court in a number of recent cases. One of them is *Tax Commissioners v. Jackson,* 283 U. S. 527, where the court considered a chain store tax and held it constitutional. The annual license increased progressively with the number of stores under the same general management, supervision or ownership. The court held that the classification was neither unreasonable nor arbitrary and that there were substantial and significant differences between the business and operation of the two kinds of stores. Mr. Justice Roberts, speaking for the court, said:

"The principles which govern the decision of this

cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Southwestern Oil Co. v. Texas,* 217 U. S. 114; *Brown-Forman Co. v. Kentucky,* 217 U. S. 563. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Rfg. Co. v. Louisiana,* 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. *Rast v. VanDeman & Lewis Co.,* 240 U. S. 342; *Quong Wing v. Kirkendall,* 223 U. S. 59. As was said in *Brown-Forman Co. v. Kentucky,* supra, at p. 573:

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear." (pp. 537-538).

Among the other cases reviewed by the Court in that

case are the following:

American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, holding that a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, did not work an unconstitutional discrimination.

Quong Wing v. Kirkendall, 223 U. S. 59, holding that a Montana statute imposing a license fee on hand laundries did not constitute a denial of the equal protection of the laws because it did not apply to steam laundries and because it exempted from its operation laundries not employing more than two women.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61, holding that an ordinance which classified theatres for license fees based on and graded according to the admission charged, was not unconstitutional although it was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller admission and therefore paying lower license fees.

See also:

Cargill v. Minnesota, 180 U. S. 452;
Armour Packing Co. v. Lacy, 200 U. S. 226;
Bradley v. Richmond, 227 U. S. 477;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Rast v. Van Deman & Lewis Co., 240 U. S. 342;
Armour & Co. v. Virginia, 246 U. S. 1;
Bronson v. Brush, 251 U. S. 182;
Alward v. Johnson, 282 U. S. 509;
Consolidated Coal Co. v. Illinois, 185 U. S. 203.

In the latter case it is held that a law for the inspection of mines was not unconstitutional by reason of its

limitation to mines where more than five men are employed at one time.

In *Citizens Tel. Co. v. Fuller*, 229 U. S. 322, it was held that there was a clear and reasonable distinction on which to base a classification for taxation between telegraph and telephone corporations conducting for profit large businesses and having offices and exchanges in cities and villages and those conducting a very small business for a mutual convenience of the incorporators. In this case the Michigan law exempted corporations having gross receipts of less than $500.00.

In *O'Connell v. State Board of Equalization*, 95 Mont. 91, 25 Pac. (2d) 114-199, the Montana court held constitutional a clause exempting corporate incomes from payment of an income tax.

In view of these cases and many others which might be cited, we do not believe that it can be said that the ground for classification in the statute under consideration, was unreasonable or arbitrary.

The various income tax laws with the exemptions thereunder by which some people pay no income tax at all have not for that reason been held unconstitutional.

It is claimed further that because of the severity of the penalty imposed by Section 3 for the violation of the Act, the appellee is denied the equal protection of the law. The case of *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, was cited in the court below. The act in that case provided not as a *penalty* for violation of the Act, but as *liquidated damages* for excessive charges, the sum of $500.00. True, as was stated by Mr. Justice VanDevanter,

the Railroad Company *claimed* that the provision for liquidated damages denied it the *equal protection of the law*, but the court did not so hold. The court simply held that the imposition of $500.00 as liquidated damages, regardless of the amount of the over-charge, was so arbitrary and oppressive as to amount to the "taking of property *without due process of law.*" (p. 351). That decision does not support appellee's claim. It was undoubtedly correct but, as we have pointed out, it was a case of excessive liquidated damages for excessive charges and not a penalty for violation of the law. A different principle was involved.

Appellee also cited *Ex parte Young*, 209 U. S. 123. The Act considered in that case fixed 2c per mile as the maximum passenger rate and provided in the Act:

> "Any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this Act shall be guilty of a felony, and, upon conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment in the State Prison for a period not exceeding five years, or both such fine and imprisonment."

In that case the violation was nothing less than a felony with a penalty not exceeding five years in State Prison; whereas, the penalty for violation of the Montana statute is not exceeding six months in the county jail. Again, the fine in the *Young Case* was not exceeding $5,000, while in the Montana case it is not to exceed $1,000. Undoubtedly the Minnesota statute considered in the *Young Case* was most drastic and severe and cannot be compared with the penalty under the Montana statute.

In *Rast v. Van Deman and Lewis*, 240 U. S. 342, this

Court held that a Florida statute which fixed a penalty not exceeding $1,000 or by imprisonment in the county jail not exceeding six months, which, it will be noted, is the same as ours, as not excessive. The court distinguished this case from the case of *Ex parte Young*, supra.

It is stated in 12 C. J. p. 1177, Section 927, that the states possess a large measure of discretion in fixing the amounts of such penalties and that such statutes will not be declared void where the amounts are not clearly excessive or unreasonable. We call attention to the following cases cited in the footnote (32):

Rail, etc., Coal Co. v. Yaple, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607;
Portland R., etc., Co. v. Portland, 210 Fed. 667;
Oregon R., etc., Nav. Co. v. Campbell, 173 Fed. 957;
Chicago, etc., R. Co. v. Davis, 114 Ark. 519, 170 S. W. 245;
State v. Oregon, etc., Co., 68 Wash. 160, 123 Pac. 3.

In the case of *Rail etc., Coal Co. v. Ohio Industrial Commission*, supra, this court held that an Ohio statute fixing the penalty as a misdemeanor and the fine not less than $300 nor more than $600, as not excessive. The penalty imposed by the Montana statute cannot be considered so excessive and unreasonable as to deny the appellee the equal protection of the laws.

IV

DUE PROCESS OF LAW

It is asserted that the statute deprives the Telephone Company of its property without due process of law for the reason that it is not permitted to deduct the tax as an operating expense.

As before stated, there is nothing in the second act to prevent appellee from deducting the payment of this tax as an operating expense. The appellee is merely prevented from setting it up as a separate item in the bill, statement or account rendered to its customers.

If the provision in the first act deprives the appellee of that right and it should be held void and unconstitutional for that reason, the rest of the act should not be affected thereby. (See I, D. supra). Furthermore, the appellee cannot be hurt in the absence of a showing that it has applied to the Public Service Commission of Montana for an increase in its rates which, no doubt, would be allowed if justified and the said provision is void. No proof has been made that because of the amount of the tax it is confiscatory.

V

SPECIFIC APPROPRIATIONS

Appellee contends that the act is unconstitutional and void in that it directs the treasurer to pay moneys out of the state treasury without specific appropriation having been made, and further because the amount credited to the Emergency Relief Fund, is not specified. It is claimed that this constitutes a violation of Section 10, Article XII, of the Montana Constitution, which provides:

> "All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

It will be noted that the Constitution does not require that the appropriation be specific in so many dollars and cents. The general rule with reference to appropriations

is set forth by the textwriter in 59 C. J. p. 250:

> "Effect when amount is ascertainable. Even where a specification of the amount is required, it is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement. Where such a requirement is recognized, if there is no constitutional provision requiring the fixing of a maximum in dollars and cents, an appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue; * * *."

The Montana Supreme Court gave consideration to the question in *State v. State Board of Examiners*, 74 Mont. 1, 238 Pac. 315. In that case it was claimed that the act was contrary to the said section of the Constitution because the rate of interest was not specified in the appropriation. The appropriation was held sufficient. The court speaking by Mr. Justice Matthews, said, on page 10:

> "However, by the provisions of the Act in question, our legislative assembly exercised that power; the amount of principal is definite; and, when the treasury notes are sold, the rate of interest will be fixed within the maximum provided in the Act. Nothing is left then to the executive officers but a mathematical calculation. The rule that 'that is certain which can be made certain' applies to appropriations. (*Town of Highgate v. State*, 59 Vt. 39, 7 Atl. 898; *State ex rel. Farrar v. Hipple*, 7 S. D. 234, 64 N. W. 120; *State ex rel. Ledwith v. Searle*, 79 Neb. 111, 112 N. W. 380; *Norcross v. Cole*, 44 Nev. 88, 169 Pac. 877; *Holmes v. Olcott*, 96 Or. 33, 189 Pac. 202.) * * *
>
> "In *People v. Miner*, 46 Ill. 384, the court said: 'It is not essential or vital to an appropriation that

> it should be of an amount certainly ascertained prior to the appropriation. There is no requirement of that kind in the Constitution.'
>
> "Inasmuch as the exact amount of the appropriation will be made certain merely by mathematical computation, if the provisions of the Act are carried into effect, this Act sufficiently complies with this provision of the Constitution."

The amount of the appropriation in the case at issue can be determined by a simple mathematical calculation, to-wit: The number of the telephones for which a certain monthly rate is paid for local use. This, of course, could not be and need not be calculated prior to the making of the appropriation. This sum, to be determined by such mathematical calculation, is specifically appropriated, 5% for administration and 95% for Emergency Relief until such time as the Governor shall determine that such relief is no longer necessary, and thereafter to the General Fund of the State. If an appropriation such as this can not be legally made it would be impossible for the legislature to express its will or for governments to function. There is nothing in the *Pomeroy Case*, 51 Mont. 119, 151 Pac. 333, cited below by appellee, which is contrary to the principles above stated. That case had to do with a different kind of situation. There was no appropriation at all. In that case the Montana Court was considering Section 7359 R. C. M. 1907. The court said:

> "In so far as Section 7359 above authorizes a judgment that the auditor draw his warrant *in the absence of an appropriation*, it is in direct conflict with the mandates of the Constitution and invalid." (p. 126—Italics supplied).

VI

DELEGATION OF LEGISLATIVE POWER TO THE GOVERNOR

It is claimed further that the statute is unconstitutional for the reason that there was an attempt to delegate legislative power to the Governor by reason of the provision in Section 4 of the Act, which provides:

> "The remaining 95% thereof shall be by him (state treasurer) credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such emergency relief fund, and after the issuance of such proclamation said 95% of such license fees shall be by such state treasurer credited to the General Fund of the state."

In other words, the legislature gave the Governor the power to determine the *fact* whether emergency relief is needed. How else can this fact be determined except by the legislature re-convening at much expense and if at a special session at the call of the Governor. Certainly, it is desirable that someone have the power to find that fact, so that the revenue for relief purposes may cease when no longer needed and it be thereafter placed in the General Fund.

The principle was well expressed in *Field v. Clark*, 143 U. S. 649, 694. In that case authority was conferred upon the President to reduce the revenue and equalize duties on imports and to suspend by proclamation the free introduction of certain commodities, when he was satisfied that any country producing such articles imposed duties or other exactions upon the agricultural or other products of the United States, which he deemed to be reciprocally

unequal or unreasonable. It was there held that the act in question was not open to the objection that it unconstitutionally transferred legislative power to the President. The court in that case said:

> "Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.
>
> " 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, Wilmington etc. Railroad v. Commissioners,* 1 Ohio St. 88. In *Moers v. City of Reading,* 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal,* 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state

of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: *'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation." (Italics supplied).

The same question was again considered in the following cases:

Union Bridge Co. v. U. S., 204 U. S. 364, 377 (where the cases are reviewed);
U. S. v. Grimaud, 220 U. S. 506 (additional cases are cited and reviewed);
Hampton & Co. v. U. S., 276 U. S. 394, 405 (where cases are cited and reviewed);
Buttfield v. Stranahan, 192 U. S. 470;
In re Kollock, 165 U. S. 526;
Oceanic Navigation Co. v. Stranahan, 214 U. S. 320;
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214;
State v. Chicago etc., Ry. Co., 38 Minn. 281, 298, 302; 134 U. S. 418, 459, 461, 464;
State v. Board of Examiners, 74 Mont. 1, 238 Pac. 316;
State v. Johnson, 75 Mont. 240, 243 Pac. 1073;
Chicago etc., Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305, 247 Pac. 162;
State v. Asal, 79 Mont. 385, 256 Pac. 1071;
Northern Pacific Ry. Co. v. Bennett, 83 Mont. 483, 272 Pac. 987.

See also cases collected in 12 C. J. 486, note 76.

In the Montana case above cited, *Chicago etc., Ry. Co. v. Board*, our Supreme Court adopted the reasoning of the

Supreme Court of the United States, see page 313 of 76 Montana Reports, where the court quoted from *U. S. v. Grimaud,* supra; *Union Bridge Co. v. U. S.,* supra, and other cases.

VII

DUTY AND PRIVILEGE

It is next claimed that the operation of the company's telephone system in Montana is not a privilege but a duty and for that reason the domestic business of the company cannot be taxed. There can be no doubt but that the company under its permissive charter (Section 14, Article XV, Montana Constitution) has obtained from the State of Montana the privilege of building a telephone system and making a charge upon the subscribers and residents of Montana for its use but having acquired that privilege, the company owes a duty as long as it chooses to occupy the field and to operate that system, to serve the people in the territory which it professes to serve. The answer of the appellants, paragraph XII, (R. 16) specifically denies that the maintenance and operation of the telephone system is not a privilege and denies that the maintenance and operation thereof is a duty and obligation imposed upon appellee. Appellants have admitted, however, that when appellee has been granted the privilege of operating a telephone system as long as it chooses to carry on and profit by that privilege, it must discharge its duty of serving the public which it in effect promised to do when it accepted the privilege. The duty accompanies the privilege. If the Telephone Company wishes to withdraw from the field of rendering local telephone

service, there is no law to prevent it and we do not understand that appellee has attempted to cite authority to the effect that it cannot withdraw and surrender that privilege. Appellee is not bound by any contract, statute or constitution to perpetually engage, at a loss, in local telephone business in Montana.

> See *City of Helena v. Helena Light & Ry. Co.*, 63 Mont. 108, 207 Pac. 337;
> *State v. Helena P. & L. Co.*, 22 Mont. 391.

In the latter case the court said:

> "We see no good reason why corporations may not discontinue their enterprises when the charter does not in express terms, or by fair implication, forbid it."

The privilege of engaging in the telephone business in Montana, is a valuable one. The benefits and profits resulting therefrom are no doubt enormous. To assert that the company may enjoy all of this and at the same time to say that the company cannot be taxed like other persons and corporations because that which was once a privilege is now no more than a duty and a burden, is certainly an astonishing argument, to say the least. We find nothing in the case of *Russell v. Sebastian*, 233 U. S. 195, (cited below) contra.

Appellee argued further that since the Constitution gives the company the right to carry on a telephone business in the state the license tax is an infringement and imposition upon that right and amounts to a denial thereof. The statement carries its own refutation. No cases were cited in support of this startling doctrine. Neither the appellee nor any other public service corporation has acquired a right to immunity from taxation. (See Sec-

tion 7, Article XII, Montana Constitution).

On the question of the right of a state to tax the intrastate business of a corporation, see the cases cited under I herein.

As for the taxes being confiscatory, no proof was offered to that effect. Appellee has not chosen to make an issue of fact upon the question of the reasonableness of the tax as compared to its earnings and the rates charged to subscribers. There is nothing to prevent the company from presenting this question to the Public Service Commission. The right to tax cannot be denied because the power may be abused. If the operation of a telephone system is not a privilege but only a duty and a burden upon appellee which it cannot lay down, an argument that it should be given a bonus would seem to be the next logical step.

VIII

A SPECIAL LAW FOR THE ASSESSMENT OR COLLECTION OF TAXES

Appellee contends that the statute is a special law for the assessment or collection of taxes in violation of Article V, Section 26, of the Montana Constitution. We are aware of no cases where a statute like the one we are considering has been held to be a special law and therefore void. The law operates throughout the state and upon every person, firm, co-partnership, association, joint stock company, syndicate and corporation within the given classification, that is, upon those who charge certain monthly rates for local use of the telephone. Since the statute is general in scope and operates upon all within

a given class, it is not a special law.

Hart Refineries v. Harmon, 81 Mont. 423, 263 Pac. 687;

State ex rel. Federal Land Bank v. Hayes, 86 Mont. 58, 282 Pac. 32;

State ex rel. Redman v. Meyers, 65 Mont. 124, 210 Pac. 1064;

Trumper et al. v. School District, 55 Mont. 90, 173 Pac. 946;

59 *C. J.* 729 and cases cited in notes 41 and 64.

"The test of whether a statute falls within the constitutional limitations and inhibitions upon the right to enact special or local legislation becomes, ordinarily, the propriety of the classification resorted to by the legislature."

59 C. J. 732, Section 319, note 80.

That the classification under the statute is not unreasonable and arbitrary, has been considered under III herein. We respectfully call attention to the cases cited under that heading.

There is no evidence in this case that the appellee is the only telephone company which is affected by this Act. So far as the pleadings and the records show, there may be many more. But even if it is the only one, if the classification is a proper one and not unreasonable or arbitrary, we are not aware of any case which would render the law a special one for that reason. The exemptions or exceptions are no more arbitrary or unreasonable than are the exemptions under the various income tax laws.

IX

POWER OF THE STATE TO FURNISH RELIEF

It is claimed that the Act is unconstitutional because it violates Section 5, Article X, of the Montana Constitution, which provides:

> "The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

By this provision of the Constitution, a duty and responsibility is cast upon the counties of the state. No limitation, however, was placed upon the legislature. The State Constitution is not a grant of power but a limitation upon the powers of the legislature.

In *State v. State Board of Equalization,* 56 Mont. 413, 185 Pac. 708, the Supreme Court of Montana said:

> "The maxim expressio unius est exclusio alterius, invoked by respondents, is a rule of interpretation, and not a constitutional command, and cannot be made to serve as a means to restrict the plenary power of the legislature, nor to control an express provision of the Constitution." (443).

In *Missouri River Power Co. v. Steele,* 32 Mont. 433, 80 Pac. 1093, the court said:

> "In the matter of legislation the people, through the legislature, have plenary power, except in so far as inhibited by the Constitution, and the person who denies the authority in any given instance must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the power exercised." (438).

See also *Hilger v. Moore,* 56 Mont. 146, 182 Pac. 477;
In re Pomeroy, 51 Mont. 119, 151 Pac. 333;

O'Connell v. State Board of Equalization, 95 Mont. 1, 25 Pac. (2d) 114, and cases cited on page 117;
State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309;
Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294.

That the State of Montana is now and for some time past, has been in a state of emergency is a matter of common knowledge of which the court will take judicial notice.

State v. Russell, 84 Mont. 61, 246 Pac. 148;
McNair v. School District, 87 Mont. 423, 288 Pac. 188;
City etc., v. Collins, 216 Cal. 187, 13 Pac. (2d) 912;
State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;
Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 Pac. (2d) 199;
State v. Industrial Commission, 207 Wis. 652, 242 N. W. 321.

Both the Governor and the legislature have solemnly declared the situation in detail. We call attention to the Governor's Messages and to Chapters 43, 44 and 46, Laws of 1933, and to Chapters 20, 24, 40, 41, 46, 48, 51, 52, 54, 55, 56 and 57 of the Extraordinary Session Laws of 1933-34. During the period following the fall of 1929, called "the depression," and accompanied in Montana by drought conditions for several seasons, an extraordinary number of the state's inhabitants have been unemployed. Starvation has confronted tens of thousands in the state; many property owners, if not a majority of them, have been unable to pay their taxes; county poor funds have been exhausted and county relief systems have been wholly in-

adequate to meet the emergency. The Federal Government has found it necessary to rush millions into the state for relief. With the county relief agencies taxed beyond their power and with the state prostrate, can it be said that the state can do nothing and must look on helplessly while its people die? Are the sovereign people of the State of Montana denied the right of self-preservation, which is the first law of nature, as well as of government?

If the power to maintain itself does not exist and all has been bestowed upon the counties so that none remains in the state in cases of state-wide calamity or emergency, then the power must nevertheless reside in that vast body of power known as the police power. We call attention to the following cases:

Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E 938, Ann. Cas. 1918A 1024;

Black v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 460, 65 L. Ed. 865, 16 L. R. A. 165;

Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877;

Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595;

Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 406, 68 L. Ed. 841;

Home Loan Building & Loan Association v. Blaisdell, 290 U. S. 398;

Walker v. Bedford, 93 Colo. 400, 26 Pac. (2d) 1051, (dissenting opinions);

Hamilton v. Martin, 173 Wash. 249, 23 Pac. (2d) 1;

Commonwealth v. Liveright, 308 Pa. 35, 161 Atl. 697;

Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, 87 A. L. R. 365.

Regardless of the emergency relief, it is evident that the legislature would have enacted the law anyway for revenue purposes. This purpose is evidenced by the fact that after the emergency has passed, all revenue shall go to the General Fund.

Dill v. People, 94 Colo. 230, 29 Pac. (2d) 1035;
State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;
59 *C. J.* 855, where it was said:

> "It has very generally been held that where a statute is unconstitutional in part only, it may be amended by striking out invalidating provisions or supplying others to make it conform to constitutional requirements."

X

LICENSE TAX FOR REVENUE

In Montana there can be no question of the right of the legislature to impose a license tax for revenue purposes upon the intrastate business of the appellee. Article XII, Section 1, of the Montana Constitution provides:

> "* * * The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

See also:

State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516;
Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982;
State v. Hammond Packing Co., 45 Mont. 343, 123 Pac. 407; Id., 233 U. S. 331, 58 L. Ed. 985, 34 Sup. Ct. Rep. 596;
Equitable Life Assur. Co. v. Hart, 55 Mont. 76, 183 Pac. 1062.

XI

REASONABLENESS OF THE TAX

Although the charge is made in the bill of complaint that the statute is unconstitutional because of the amount of the exaction therein imposed, no proof was made that the amount of the tax is arbitrary, unreasonable and oppressive. Furthermore, if the amount of the tax is more than can be borne under the existing rates, a remedy lies before the Public Service Commission of Montana, to which it does not appear that any application has been made.

XII

CONSTRUCTION OF STATUTES

This court has said that every act is to be construed so as to maintain its constitutionality, if possible. (*New York Central R. R. v. United States,* 212 U. S. 481). Every reasonable presumption will be made in favor of the validity of the statute. These principles are so well settled that no citation of authorities is necessary. For collection of cases, see 12 C. J. 787 et seq., and notes. In *State ex rel. Bonner v. Dixon,* 59 Mont. 58, 195 Pac. 841, it was said:

> "The law is settled that the constitutionality of a legislative enactment is prima facie presumed, and every intendment is in favor of upholding it, unless it appears unconstitutional beyond a reasonable doubt." (Citing many cases).

Where no federal question is involved, the courts of the United States will adopt and follow the decisions of the state courts in construing their own constitutions and

laws. (12 C. J. 698, Section 37). For list of cases decided by this court, see footnote 52.

For the reasons urged, we respectfully submit that the Decree of the District Court, granting a permanent injunction, should be reversed, with directions that such injunction be dissolved.

Respectfully submitted,

RAYMOND T. NAGLE,
Attorney General.

ENOR K. MATSON,
Assistant Attorney General.
Solicitors for Appellants.

APPENDIX

CHAPTER 174, LAWS OF MONTANA, 1933, TWENTY-THIRD SESSION

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10c) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20c) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner effect (affect) the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

CHAPTER 54, LAWS OF MONTANA, 1933-34, TWENTY-THIRD EXTRAORDINARY SESSION

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-Partnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

A license tax of Two Dollars ($2.00) for each such instrument.

No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation

said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the state."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved January 20, 1934.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, as Governor of the State of Montana;

RAYMOND T. NAGLE, as Attorney General of the State of Montana; and

JAMES J. BRETT, as Treasurer of the State of Montana,

Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellee.

Brief of Appellee

MILTON SMITH,
M. S. GUNN,
J. R. TURNQUIST,
ELMER L. BROCK,
Solicitors for Appellee.

J. P. AKOLT,
E. R. CAMPBELL,
Of Counsel.

ALBRIGHT-ROEWE PTG. CO.

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